

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

NOV 22 1996

In the Matter of )  
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 Advanced Television Systems )  
 and Their Impact Upon the )  
 Existing Television Broadcast )  
 Service )

MM Docket No. 87-268

To: The Commission

**RESPONSE TO INITIAL REGULATORY FLEXIBILITY ANALYSIS**

Empire Broadcasting, L.L.C. ("Empire"), by its attorneys, hereby submits these comments in response to the Initial Regulatory Flexibility Analysis ("IRFA") in the Commission's Sixth Further Notice of Proposed Rule Making ("Sixth FNPRM"), FCC 96-317, released August 14, 1996, 61 Fed. Reg. 43209 (August 21, 1996), in the above-captioned proceeding.

Empire is the licensee of low power television station W17BM, New York, New York. W17BM transmits from the Empire State Building in New York City, serving over nine million persons in over three million households in the New York region.<sup>1</sup> W17BM operates 24 hours per day, seven days per week and provides the only broadcast source

<sup>1</sup> See Engineering Statement of Kevin T. Fisher attached as Exhibit A.

of television programming of its type in the New York City area,<sup>2</sup> an area well known for its diversity with significant foreign language-speaking populations.<sup>3</sup> W17BM's programming includes a substantial amount of locally-produced programming, including local news and news magazine programming supported by a news department.

Section 603(c) of the Regulatory Flexibility Act requires the Commission to include in its initial regulatory flexibility analysis:

a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.<sup>4</sup>

By any reasonable definition, nearly all low power television station licensees, including Empire, are small entities.<sup>5</sup> In the Sixth FNPRM, the Commission proposes to allot a second television channel for each full power television station in the nation for use in transmitting digital television ("DTV"). Although the Commission acknowledges in the IRFA that "[s]tudies by the FCC staff indicate that there is not sufficient [radiofrequency]

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<sup>2</sup> W17BM's programming is predominately in the Korean language. The station has also broadcast programming in other foreign languages from time to time.

<sup>3</sup> The coverage of W17BM includes, for example, an Asian population of almost 600,000. Id.

<sup>4</sup> 5 U.S.C. § 603(c).

<sup>5</sup> The Commission states in the IRFA that there are "about 1,750 licensed [low power television] stations" and that it has "issued about 1,400 construction permits for new [low power television] stations." IRFA at p. C-4. The Commission "believes that all such stations" meet the definition of a small entity for the purposes of the Regulatory Flexibility Act. Id.

spectrum to accommodate both low power stations and DTV stations,"<sup>6</sup> the Commission proposes in the Sixth FNPRM to concentrate all such DTV channel allotments within a "core spectrum" of existing television channels 7-51, with a view toward possibly eliminating use by television broadcasting stations of the spectrum now used for television channels 2-6 and 52-69.<sup>7</sup>

The Commission's IRFA does not adequately address the potential displacement of low power television stations, the resulting severe economic impact or destruction such a result brings upon low power television licensees and -- as required by law under the Regulatory Flexibility Act -- "significant alternatives...which minimize any economic impact of the proposed rule on small entities."<sup>8</sup> In the case of Empire's W17BM, the Commission's proposal to allot Channel 17 to Garden City, New York for DTV use by television station WLIW would conflict with W17BM's existing use of Channel 17 at New York City. Were Channel 17 to be so allotted for DTV use, it would cause irreparable harm to the

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<sup>6</sup> Id. at p. C-6.

<sup>7</sup> In previous deliberations in this proceeding prior to the present "core spectrum" proposal, the Commission studies determined that "up to one-third of all [low power television] stations...may have to cease operation to make way for DTV stations." Id. at p. C-6 & p.C-6 n.11.

<sup>8</sup> As Empire has set forth in its Comments to the Sixth FNPRM being filed on this day, the Commission also has failed adequately to address this impact and the resulting loss of the unique and diverse services which stations such as W17BM provide to the public. Such a result would be counter to the Commission's fundamental goal of diversity in broadcast television services and would deny the public the programming uniquely provided by them, in derogation of the public interest.

service of W17BM. W17BM would, at a minimum, be subject to displacement to another channel, and very well might be forced to discontinue operation entirely.<sup>9</sup>

Notwithstanding the substantial destructive impact that the Commission's proposals will have on low power television licensees including Empire, the Commission fails to address in the IRFA the additional negative impact of its "core spectrum" proposal, which could ultimately reduce the spectrum available to television broadcasting including low power television stations by over one-third, and the alternatives of using more or all of the other existing television channel spectrum to reduce this disastrous impact upon low power television station licensees. By any reasonable definition, such alternatives are "significant," yet the IRFA is bereft of any discussion of them whatsoever. The Commission also has failed to consider other significant alternatives to its proposals in the Sixth FNPRM, including means for more efficient use of the spectrum. For example, the present interference protection rules, which were developed in an era of now-outdated technology, should be updated properly to take into account advances in transmission system technologies, computerized interference prediction models and improvements in receiver performance. Such updating and refinement of the Commission's rules would afford greater flexibility in accommodating the needs

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<sup>9</sup> Because the spectrum within the New York City region is among the most congested in the nation, W17BM would very likely be unable to modify operation to another channel, let alone replicate its present service.

of low power television stations and lessen the deleterious impact upon low power television licensees.

The Commission is required by law under the Regulatory Flexibility Act to address in the IRFA significant regulatory alternatives to its proposals in the Sixth FNPRM. As set forth herein, the Commission has failed to do so.

Respectfully submitted,

**EMPIRE BROADCASTING, L.L.C.**

By:  \_\_\_\_\_  
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November 22, 1996

EXHIBIT A

SMITH AND FISHER

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ENGINEERING STATEMENT

The engineering data contained herein have been prepared on behalf of EMPIRE BROADCASTING, LLC. ("Empire"), licensee of Low-Power Television Station W17BM, Channel 17, Manhattan, New York, in support of its Comments regarding the Commission's Initial Regulatory Flexibility Analysis addressing its *Sixth Further Notice of Proposed Rule Making* concerning the assignment of digital television (DTV) channels to existing television (NTSC) broadcast stations.

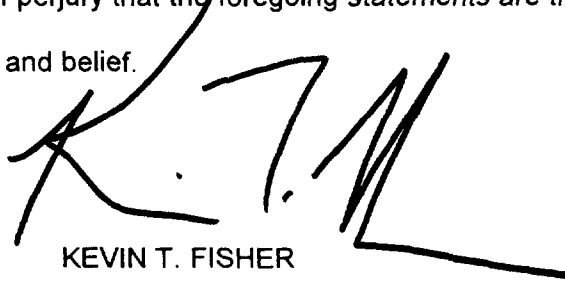
The W17BM Grade A contour covers 9,225,119 persons residing in 3,587,504 households. Of this number, 594,905 people are of Asian descent.

In its *Sixth Further Notice* the FCC proposes to assign a DTV channel to each of the existing full-power television stations. The Commission also proposes to pack DTV channels into a band between Channels 7 and 52, known as the core region, and ultimately reclaim Channels 2-6 and 52-69 following a transition period in which the full-service broadcasters will operate with both DTV and NTSC channels. In so doing, the Commission has not addressed the plight of LPTV facilities which undoubtedly will be displaced by future DTV facilities. As a result, Empire fully supports the comments, objections, and suggestions filed by the Community Broadcasters Association in this proceeding.

In the *Sixth Further Notice* the FCC proposed assigning DTV Channel 17 to WLIW, Garden City, New York. The WLIW transmitting facility is approximately 30 miles from that of W17BM. It is certain that the operation of W17BM would cause irreparable harm to the reception of DTV Channel 17 in New York City, and vice versa, meaning that W17BM would be subject to displacement at the least, and discontinuance of

operation at the worst. Without the prospect of continued operation during the DTV transition period, Empire objects to the assignment of DTV Channel 17 to WLIW. If another DTV channel within the core region cannot be found for WLIW, then Empire objects to the FCC's channel packing scheme and requests that one of the upper UHF channels be assigned as a DTV channel to WLIW.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.



KEVIN T. FISHER

November 18, 1996